

FCC MAIL SECTION

Before the
 Federal Communications Commission
 Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 93-250

In the Matter of

Amendment of Section 73.202(b),	RM-8331
Table of Allotments,	RM-8397
FM Broadcast Stations.	RM-8398
(Fairview and Cambridge Springs, Pennsylvania, and North Kingsville, Ohio) ¹	

REPORT AND ORDER
 (Proceeding Terminated)

Adopted: February 14, 1995; Released: February 23, 1995

By the Chief, Allocations Branch:

1. At the request of KDC, Inc. ("KDC"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7104 (1993), proposing the allotment of Channel 298A to Fairview, Pennsylvania, as the community's first local aural transmission service. KDC filed comments reiterating its intention to apply for Channel 298A, if allotted. Counterproposals were filed by North Kingsville Broadcasting ("NKB") requesting the allotment of Channel 298A to North Kingsville, Ohio, and Thomas J. Sauber ("Sauber") requesting the allotment of Channel 298A to Cambridge Springs, Pennsylvania.² Reply comments were filed by KDC, NKB and Sauber. Co-channel Class A allotments are required to be separated by at least 115 kilometers. However, neither Fairview, Cambridge Springs nor North Kingsville are located sufficiently far apart to comply with the spacing requirements. Therefore, the proposals are mutually exclusive.

2. NKB requests the allotment of Channel 298A to North Kingsville, Ohio, as the community's first local aural transmission service, and states its intention to apply for the channel, if allotted. NKB points out that North Kingsville is incorporated and listed in the 1990 U.S. Census with a

population of 2,672 persons. According to NKB, North Kingsville has its own local government, consisting of a mayor and eight council members, as well as its own fire and police departments. It believes that North Kingsville is more deserving of the channel allotment than Fairview because Fairview is considerably smaller in population, with a 1990 U.S. Census population of 1,988 persons, and with its proximity to Erie, Pennsylvania, population 108,718 persons and nine local aural facilities, enjoys more reception service than North Kingsville. According to NKB, the closest community of significant size to North Kingsville is Astabula, Ohio, population 21,633 persons and three local aural services. NKB states that Channel 298A can be allotted to North Kingsville in compliance with the Commission's minimum distance separation requirements with regard to domestic and Canadian allotments if the power does not exceed the 6 kW maximum for Class A stations. However, because Class A channels are treated as Class B1 channels with regard to Canada, a short-spacing to vacant Channel 298A at Welland, Ontario, occurs. Therefore, NKB requests that concurrence be sought from Canada as a specially negotiated allotment.

3. Sauber requests the allotment of Channel 298A to Cambridge Springs, Pennsylvania, as its first local aural transmission service and states his intention to apply for the channel, if allotted. Sauber, citing *Eaton, Sandy Springs, Georgia*; *Anniston, Lineville, Alabama* ("Sandy Springs"), 6 FCC Rcd 6580 (1991), argues that Fairview should not be awarded a first local service preference but instead should be credited with the services licensed to nearby Erie, Pennsylvania.³ In deciding the *Sandy Springs* case, Sauber states that the Commission looked at the following three factors: (1) signal population coverage; (2) size and comparative population; and (3) the interdependence of the suburban community and the metropolis.⁴ In this case, Sauber states that a Fairview station will serve Erie since it is located less than ten miles from downtown Erie. Fairview has a population of only 1,988 persons compared to a population of 108,718 persons for Erie, and finally, that KDC has provided no demographic data showing that Fairview is independent of the larger community of Erie or that Fairview has economic, political and cultural organizations which identify themselves with the smaller community. Sauber faults KDC for not providing this information, contending that it is long-held Commission policy that where a party has the ability to produce evidence, its failure to do so creates a presumption that the evidence would be detrimental to that party's case, citing *Washoe-Shosone Broadcasting*, 3 FCC Rcd 3948, 3953 (Rev. Bd. 1988).

¹ The communities of Cambridge Springs, Pennsylvania, and North Kingsville, Ohio, have been added to the caption.

² Public Notice of the filing of the counterproposals was given on December 6, 1993, Report No. 1989.

³ In *Sandy Springs* the Commission denied a request to change the community of license for an FM station at Anniston to specify Sandy Springs. Although the petitioner had sought a first local service preference for the Sandy Springs allotment, the Commission, based upon a finding that the community is located within, and not sufficiently independent of, the Atlanta Urbanized Area, credited Sandy Springs with having all of the aural services licensed to communities within the Atlanta Urbanized Area.

⁴ The factors used in *Sandy Springs* to determine the indepen-

dence of a community are derived from Commission decisions in *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck ("Tuck")*, 3 FCC Rcd 5374 (1988). However, we find that Sauber's reference to *Sandy Springs* is not on point. In *KFRC*, *Tuck* and *Sandy Springs*, the Commission set forth the type of evidence to consider in determining whether a suburban community should be denied a first local service preference when requesting a change of community of license. See *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). KDC is not requesting a change of community of license but rather a new allotment.

4. As to Cambridge Springs, Sauber states that it is an isolated community of 1,837 persons in northwestern Pennsylvania. In contrast to Fairview, Cambridge Springs is located more than 20 miles from downtown Erie and 13 miles from Meadville, Pennsylvania (1990 Census population of 14,318 persons). Cambridge Springs has its own local government as well as its own police department, volunteer fire and ambulance departments, schools, library, municipal garage and senior center. Cambridge Springs also has numerous businesses, churches and several manufacturing plants. Additionally, the community has a large State correctional institution.

5. In reply comments, KDC submits that all three proposals can be accommodated. To this end, it suggests that Channel 241A be allotted to North Kingsville, Channel 283A to Cambridge Springs, and Channel 298A to Fairview. KDC states that the North Kingsville and Cambridge Springs channels can be allotted at the coordinates proposed by the respective petitioners and operated nondirectionally with 6 kW of power. KDC notes that it is well-established Commission policy that channels of the same class are presumed to be equivalent for allotment purposes and that alternate channels may be allotted in response to counterproposals, citing *Churubusco, Huntington, Roanoke and South Whitley, Indiana*, 5 FCC Rcd 916 (1990) and the Appendix to Notices of Proposed Rule Making.

6. KDC also disputes Sauber's reliance on *Sandy Springs*, *supra*, for the proposition that the Fairview proposal does not represent a first local service but rather another service to Erie. KDC states that the type of evidence considered in determining whether Sandy Springs should be given a first local service preference was in connection with the petitioner's request for a change in an existing station's community of license. Here, the request is for a new local service, not a change of community for an existing service. In support, KDC cites *Remington and Falmouth, Virginia*, 8 FCC Rcd 6627 (1993), where the Commission rejected an attempt to rely on a change of community analysis in a new community proceeding.

7. KDC states that the appropriate analysis of the competing requests must be based on the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. In this case, KDC points out that none of the proposals purport to provide either a first or second aural service but each proposes a first local service to their respective communities. Therefore, it submits that the Commission must make a determination based upon factors relevant to the fourth priority. Under this priority, KDC submits that the most important factor is population. KDC recognizes that North Kingsville has a larger population than Fairview and that Cambridge Springs is smaller than the other two communities. However, it contends that Fairview is the only community which has gained population, approximately 8%, between 1980 and 1990. Conversely, the population of Cambridge Springs decreased almost 13% and the popula-

tion of North Kingsville declined 9% during the same time period. KDC states that each of the communities receive a commensurate amount of services, noting that Cambridge Springs is located only twenty miles from downtown Erie and also receives service from stations licensed to the nearby communities of Meadville, Edinboro and Saegertown. As to North Kingsville, KDC states that the community receives service from the three stations licensed to Ash-tabula, Ohio, and the two stations licensed to Conneaut, Ohio. Finally, KDC disputes the allegations that Fairview is not a community in its own right but is merely a suburb of Erie. It states that Fairview was founded in 1792 and incorporated in 1868. The community has its own local government, police and fire departments, public schools, numerous retail and professional businesses and the Fairview Business Association. In addition, it has its own churches, senior center, American Legion post and historical museum.

8. Sauber, in reply comments, agrees that a comparison of the communities need not be made since each of the communities can receive an allotment. He supports the allotment of Channel 241A to North Kingsville and Channel 230A to Fairview. This allotment scheme would permit the allotment of Channel 298A to Cambridge Springs. Sauber notes that KDC has previously suggested that Channel 283A be allotted to Cambridge Springs.⁵ However, he argues that the public interest would be better served by allotting Channel 298A to Cambridge Springs and Channel 230A to Fairview. He states that Channel 298A at Fairview requires the use of a directional antenna where Channel 230A does not. He claims that a directional antenna costs is not only more expensive (about \$6,000.00) than a non-directional antenna but also substantially reduces the ability of the station's signal to penetrate buildings because of the reduction in effective radiated power. In supporting the allotment of Channel 230A to Fairview, Sauber discounts KDC's allegations about "ducting", pointing out that the Commission has traditionally rejected such considerations since it would virtually eliminate allotments to communities located along water paths.⁶

9. NKB opposes the allotment of Channel 241A to North Kingsville, contending that it is inferior to Channel 298A. NKB states that Channel 298A does not require the use of a directional antenna if operated as a 6 kW Class A facility. However, Channel 241A would be short-spaced by 7.3 kilometers to Station CFPL-FM, Channel 240C1, London, Ontario, Canada. NKB recognizes that Canada may agree to the allotment of Channel 241A as a specially negotiated allotment. However, it reiterates its contention that Channel 241A would be an inefficient and inferior allotment because of the short-spacing to Canadian Station CFPL-FM. It claims that this position is buttressed by past Commission pronouncements on the propagation of signals over water, citing *Bay Shore, New York*, 50 FR 10768 (1985), *recons. denied*, 59 RR 2d 1652 (1986) (where signal path is primarily over water the Commission's normal prediction method would not adequately reflect the signal strength). In this case, the signal path between North Kingsville and London, Ontario, is almost entirely over Lake Erie and the

⁵ Sauber faults KDC for failing to include a preclusion study addressing where other first local transmission services would be precluded if Channel 283A were allotted to Cambridge. However, such a preclusion study is no longer required to be submitted with petitions for rule making. See *Revision of FM*

Assignment Policies and Procedures, 90 FCC 2d 88, 93 (1982).

⁶ Ducting is a phenomenon caused by atmospheric conditions that enhance the propagation of signals most often occurring along paths over or near large bodies of water.

area along the north shore area of Ohio which would be served by the North Kingsville station would likely receive a much stronger signal from Canadian Station CFPL-FM than predicted by the Commission's propagation model, thus resulting in substantial interference with the North Kingsville station. NKB states that the area has a history of enhanced propagation due to ducting during certain times of the year. Therefore, NKB states that if Channel 241A is allotted to North Kingsville it will not apply for the channel.

10. KDC opposes the allotment of Channel 230A to Fairview because of the short-spacing to Station CKLW-FM, Channel 230C1, Windsor, Ontario, Canada. While acknowledging that Channel 298A at Fairview would be short-spaced to a co-channel allotment at Welland, Ontario, KDC argues that the two situations are not the same. First, the Welland allotment at this time is vacant, and secondly, the channel is allotted as a Class A. If Channel 230A is allotted to Fairview, the short-spacing would be to the co-channel Class C1 allotment being used by Station CKLW-FM, Windsor, Ontario, which operates with 100 kW power and has a long over-water propagation path. Therefore, it urges that Channel 298A be allotted to Fairview, Channel 241A to North Kingsville and Channel 283A to Cambridge Springs.

DISCUSSION

11. After careful review of the pleadings, we believe that each of the communities is deserving of a first local FM transmission service. Further, we find that a comparison of the communities is not necessary since an alternate channel is available for each. Therefore, we will allot Channel 298A to North Kingsville, Channel 283A to Cambridge Springs and Channel 230A to Fairview.

12. We recognize that both NKB and KDC oppose the allotment of the alternate channels proposed for their community because the short-spacing to the Canadian allotment will be to an operating Class C1 station and not to an unused Class A channel at Welland, thus raising the spectre of greater interference than predicted because of enhanced over-water propagation. While the Commission does not take such "enhanced over-water propagation" or "ducting" claims into consideration in allotment proceedings, Channel 298A cannot be allotted to both North Kingsville and Fairview and thus a choice as to which community will be allotted Channel 298A must be made. See *San Clemente, California*, 50 FR 8226, March 1, 1985, rev. denied, 2 FCC Rcd 2514 (1987) and *Ventura, California*, 2 FCC Rcd 5882 (1987), recon. 7 FCC Rcd 5601 (1992). We have based our decision to allot Channel 298A to North Kingsville on several factors. First, North Kingsville is the more populous community, with a 1990 Census population of 2,672 persons versus a 1990 Census population of 1,988 persons at Fairview. Secondly, North Kingsville receives only four FM services while Fairview receives seven.⁷ As to the allotment at Cambridge Springs, Sauber states that both Channel 298A and Channel 283A

can be used but expresses a preference for Channel 298A. However, this preference is based on the unsupported statement that Channel 298A provides the most flexibility in choosing transmitter site locations. We find that this statement does not provide a justification for the allotment of Channel 298A instead of Channel 283A. Finally, we note that while all of the allotments require the concurrence of the Canadian government as specially negotiated short-spaced allotments, this is because 6 kW Class A allotments are considered as Class B1's for notification purposes pursuant to the U.S.-Canadian Agreement. In actuality, all of the channels proposed for allotment herein can be operated with the full 6 kW of power without the need to directionalize to protect the Canadian stations.

Technical Summary

13. Channel 230A can be allotted to Fairview and Channel 298A can be allotted to North Kingsville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 283A can be allotted to Cambridge Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.4 kilometers (0.3 miles) east.⁸ Canadian concurrence in each of these allotments as specially negotiated short-spaced allotments has been received since all of the communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective April 10, 1995, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
North Kingsville, Ohio	298A
Cambridge Springs, Pennsylvania	283A
Fairview, Pennsylvania	230A

15. The window period for filing applications will open on April 10, 1995, and close on May 11, 1995.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

⁷ While not of decisional significance, we note that North Kingsville also has a greater short-spacing than Fairview. Channel 241A at North Kingsville would be 46 kilometers short-spaced to Station CFPL-FM, Channel 240C1, London, Ontario, while Channel 230A at Fairview would be 29 kilometers short-spaced to Station CKLW-FM, Channel 230C1, Windsor, Ontario.

⁸ The coordinates for Channel 298A at North Kingsville are North Latitude 41-54-18 and West Longitude 80-41-36. The coordinates for Channel 230A at Fairview are 42-01-48; 80-15-12. The coordinates for Channel 283A at Cambridge Springs are 41-48-13; 80-03-24.

FEDERAL COMMUNICATIONS COMMISSION

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